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No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA

v.

KITTY JACKSON, HILDA J. FOSTER, AND HILDA J. FOSTER, AS ADMINISTRATRIX OF THE ESTATE OF JACK JACKSON, ETC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court is reported in 27 F. (2d) 751.

JURISDICTION

This case comes here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. The certificate was filed March 28, 1929.

QUESTION PRESENTED

The question which arises here is as to the validity of the Executive orders extending the trust

period in the homestead patent issued to Jack Williams under the Indian Homestead Act of July 4, 1884, c. 180, 23 Stat. 76, 96. The question is presented by the following questions certified by the Circuit Court of Appeals (R. 2):

> 1. Could the trust period and the restriction of alienation in an Indian homestead patent issued under the act of July 4, 1884 (43 U. S. C. A., sec. 190), be extended by Executive orders?
>
> 2. Did the act of June 21, 1906 (25 U. S. C. A., sec. 391), authorize the President in his discretion to continue restrictions on alienation in patents issued under the Indian homestead act of July 4, 1884? (43 U. S. C. A., sec. 190.)

STATUTES INVOLVED

The Act of July 4, 1884, c. 180, 23 Stat. 76, 96 (U. S. C., Title 43, Sec. 190), provides:

> That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; * * * but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the

> Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The Act of June 21, 1906, c. 3504, 34 Stat. 325, 326 (U. S. C., Title 25, Sec. 391), provides:

> That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best: *Provided, however,* That this shall not apply to lands in the Indian Territory.

Other statutes bearing on the questions presented will be referred to in the argument.

STATEMENT OF THE CASE

The certificate makes the following statement of the case (R. 1–2):

> The United States on behalf of Bob Roberts, a tribal Indian, brought a suit in the District Court of the United States for the northern district of California to quiet title to certain lands which had been conveyed by a trust patent issued on December 11, 1891, to Jack Williams, an Indian, in accordance

with the act of July 4, 1884. (43 U. S. C. A., sec. 190.) The trust period of the patent would have terminated December 11, 1916, but the patentee died on January 24, 1916, and the land passed to Nellie Williams, an Indian, his widow and sole heir. On March 18, 1921, Nellie Williams conveyed the land to Jack Jackson, an Indian, and the deed was recorded November 3, 1922. That conveyance was not and never has been approved by the Secretary of the Interior. On October 10, 1922, Nellie Williams died leaving a will by which she devised the land to Bob Roberts. Her will and devise were approved by the Secretary of the Interior on December 1, 1923. Jack Jackson has since died and the appellees herein are his heirs.

On the trial in the court below it was shown on behalf of the appellant that the restriction on alienation originally contained in the trust patent issued to Jack Williams, which would have expired in December, 1916, was extended by a series of Executive Orders making one year extensions from 1916 to 1919, inclusive, and a further twenty-five year extension made in 1920, and it was the contention of the appellant that the conveyance to Jack Jackson, which was made during the existence of a restriction thus imposed on the alienation, was void; that Indian homesteads and Indian allotments are in all essential respects upon the same footing, and that 25 U. S. C. A., sec. 391 [Act of June 21, 1906, c. 3504, 34 Stat. 325, 326], affords authority for the extension of the trust

period in homestead patents issued to Indians under the Indian homestead act of July 4, 1884, as decided in the case of *Toss Weaxta,* 47 L. D. 574. The court below, following the decision in *Seaples* v. *Card,* 246 Fed. 501, held that the Secretary of the Interior was without authority to extend the period of restriction imposed by the original patent to Jack Williams and that Jack Williams was not an allottee within the meaning of the act of June 21, 1906 (25 U. S. C. A., sec. 391).

SUMMARY OF ARGUMENT

1. The benefit of the Act of July 4, 1884, was conferred upon the Indians, as such. Therefore, Congress, in the exercise of its constitutional powers to legislate for the Indians, could authorize the President in his discretion to continue the trust period and resulting restrictions on alienation in patents issued to Indians under that Act. Consequently the first question resolves itself into an inquiry as to whether or not Congress has conferred upon the President such authority.

2. The Act of June 21, 1906, should be construed in the light of its policy, the purposes of legislation in *pari materia,* and the construction placed upon it by the Interior Department. When so construed, Indian homesteaders come within its purview. Consequently the President, under that Act, had authority to continue restrictions on alienation in patents issued to Indians under the Act of July 4, 1884.

ARGUMENT

I

CONGRESS, IN THE EXERCISE OF ITS CONSTITUTIONAL POWERS OVER THE INDIANS, COULD AUTHORIZE THE PRESIDENT IN HIS DISCRETION TO CONTINUE THE RESTRICTIONS ON ALIENATION IN PATENTS ISSUED TO INDIANS UNDER THE ACT OF JULY 4, 1884

It is not considered necessary for the purposes of this brief to enter into any elaborate discussion of the status of the Indians or their relation to the United States, as this Court has in numerous cases declared that under constitutional authority the Indians have been considered to be under the protection of the Government and treated as wards of the Nation, and the United States has acted as the guardian of their persons and the trustee of their property.

As an indication of the power of the Federal Government over the Indians, the following language of this Court in the case of *United States* v. *Kagama,* 118 U. S. 375, 384, is significant:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
>
> * * * * *
>
> The power of the General Government over these remnants of a race once powerful,

> now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The same words were repeated by this Court in the case of *United States* v. *Nice*, 241 U. S. 591, 597.

Under the original Homestead Act of May 20, 1862, c. 75, 12 Stat. 392, the right to enter a homestead was limited to citizens of the United States, or those who had filed their declaration or intention to become such. Indians were not citizens and could not be naturalized, except by Act of Congress. *Elk* v. *Wilkins*, 112 U. S. 94. No such authority had been generally granted at the time of the Homestead Act. Consequently an Indian could not originally enter a homestead. *United States* v. *Joyce*, 240 Fed. 610, 614. Later, as the general policy of the Government to grant lands in severalty to the Indians was being developed, either by means of treaty with the Indian tribes, as such, or through special Acts of Congress, laws were successively enacted gradually extending the benefit of the homestead laws to certain classes of Indians, obviously with the purpose of encouraging them to abandon their tribal customs and relations, to attain a self-supporting station, and to become useful and law-abiding citizens. See the Acts of March 3, 1865,

c. 127, 13 Stat. 541, 562; March 3, 1875, c. 131, 18 Stat. 402, 420; January 18, 1881, c. 23, 21 Stat. 315. Then came the Indian Homestead Act of July 4, 1884, which was designed to permit all Indians, whether tribal or not, to avail themselves of the benefit of the homestead laws as fully and to the same extent as might be done by citizens of the United States (*United States* v. *Joyce, supra; Hemmer* v. *United States,* 204 Fed. 898; *United States* v. *Hemmer,* 241 U. S. 379), *not as citizens but as Indians.* (See Opinion in the case of *Frank Bergeron,* 30 L. D. 375, 376.) Their rights were subject to restrictions against alienation for the period of twenty-five years, and the United States was to hold the lands in trust for the sole use and benefit of the Indian homesteader for that period.

Soon after the approval of the Act of 1884, Congress passed the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, authorizing allotments to Indians upon Indian Reservations or upon the public lands of the United States. Under this Act, trust patents were issued to them of the same legal force and with the same limitation upon the power of alienation as the patents issued to Indian homesteaders under the Act of 1884. In considering the provisions of the Act of 1887 this Court, in *Levindale Lead Co.* v. *Coleman,* 241 U. S. 432, 437, said that such provisions "must be construed in the light of the policy they were obviously intended to execute," and that

> It was a policy relating to the welfare of Indians,—wards of the United States. The establishment of restrictions against alienation "evinced the continuance, to this extent at least, of the guardianship which the United States has exercised from the beginning." *Heckman* v. *United States,* 224 U. S. 413, 436; *United States* v. *Kagama,* 118 U. S. 375, 384; *United States* v. *Rickert,* 188 U. S. 432, 437, 438; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 316; *Williams* v. *Johnson,* 239 U. S. 414, 420.

It is submitted that the same reasoning applies in the present case, as the policy of the Act of 1884 is the same as that of the Act of 1887.

In the instant case, the District Court does not seem to question the proposition that Congress during the continuance of the guardianship had ample power to extend the trust period or limitations upon the power of alienation of Indian homesteads. The existence of this power can not be doubted in view of the decisions in *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *Heckman* v. *United States,* 224 U. S. 413; and *Brader* v. *James,* 246 U. S. 88.

As Congress had the power to extend the trust period, with resulting restrictions upon the right of alienation, it could authorize the President to extend that period in his discretion, as it did by the first proviso of Section 5 of the General Allotment Act. See *United States* v. *Reynolds,* 250 U. S. 104, wherein this Court sustained the validity of an

Executive order made within the original trust period in a patent issued under the Act of 1887.

In view of the above, it is submitted that the answer to the first question certified by the Circuit Court of Appeals resolves itself into an inquiry as to whether or not any Act of Congress authorized the President to continue restrictions on alienation in patents issued to Indians under the Act of July 4, 1884.

II

THE ACT OF JUNE 21, 1906, AUTHORIZED THE PRESIDENT TO CONTINUE RESTRICTIONS ON ALIENATION IN PATENTS ISSUED TO INDIANS UNDER THE ACT OF JULY 4, 1884

The provisions of the Act of June 21, 1906 (p. 3, *supra*), require judicial interpretation. It confers upon the President discretional authority to continue restrictions upon alienation for such period as he may deem best in cases where the trust or other patent has been issued under *any* law or treaty to an Indian *allottee*.

Had Congress added after the word "allottee" the phrase "or Indian homesteader," it is quite probable that the present controversy would never have arisen. But such phrase might have introduced in the Act a greater and more serious element of doubt, for if it had been used, it might fairly be argued that all Indian homesteaders, whether claiming *as citizens* under the general homestead laws or *as Indians* under the Act of 1884, would be included within the purview of the provisions here involved.

The phrase was not added. It was argued, and was held by the District Court, that since the Act mentions only Indian allottees and is silent as to Indian homesteaders, it does not apply to any *Indian homesteaders,* whether the latter acquired their homestead rights, *as citizens,* under the general homestead laws, or *as Indians*—wards of the United States—under the Indian Homestead Act of 1884.

We submit, however, that the absence of the phrase "Indian homesteaders" from the Act does not warrant such construction, and that the Act properly construed includes within its purview Indian homesteaders claiming under the Act of 1884, although naturally it does not include Indian homesteaders claiming under the general homestead laws.

Even if we should concede, which we do not, that the Act of 1906 should be read as a piece of legislation entirely disconnected from all other legislation of the same sort relating to the Indians, the question would naturally arise as to the meaning of the words "Indian allottee" as used by Congress in that Act. Ordinarily, of course, an Indian allottee is an Indian to whom an allotment has been made. But this definition falls far short of meeting the requirements of the situation, for the question then arises, just what an allotment is.

The words "Indian allottee" may be said to have at least two different meanings in Indian law as is illustrated hereinafter; and the question is whether Congress intended by those words to in-

clude only one or both of those meanings. We contend that it meant to include both.

The general rule of statutory construction is that the intention of the lawmaker, as disclosed by the language used, is to prevail, but when that intention does not clearly appear, recourse may be had to other sources of information to aid in the discovery of that intention. And for this purpose the obvious policy of the Act (*Levindale Lead Co.* v. *Coleman, supra*), the purposes of statutes in *pari materia,* especially if constituting part of a system (*United States* v. *Taylor,* 104 U. S. 216; *Tiger* v. *Western Investment Co., supra; United States* v. *Freeman,* 3 How. 556; *Heckman* v. *United States, supra; United States* v. *Hemmer, supra*), and the construction placed upon the same by the Executive Department in charge of their administration (*United States* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337; *Robertson* v. *Downing,* 127 U. S. 607; *United States* v. *Healey,* 160 U. S. 136) are to be given great weight.

The policy of the Act of 1906 obviously relates to the welfare and protection of Indians—wards of the Government—who have not as yet been released from governmental control with respect to their lands. In *Beck* v. *Flournoy Live-Stock & Real Estate Co.,* 65 Fed. 30, 34, the court, in explaining the purpose of the limitations upon the power of the Indians to sell or make contracts respecting lands that may be set apart for their individual use and benefit, said:

> These limitations * * * were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance, and very likely become paupers.

It would seem unlikely that Congress, when authorizing the President in his discretion to extend the period of restrictions in trust or other patents issued to Indians under *any* law or treaty for the purpose of protecting them against their own improvidence and thriftlessness, meant to exclude from the beneficent policy of the Act *Indian homesteaders* claiming under the Act of 1884 who still were regarded as wards of the United States.

In considering the purposes of statutes in *pari materia,* it must be remembered that the Indian Homestead Act of July 4, 1884, *supra,* was soon folfowed by the General Allotment Act of February 8, 1887, *supra.* Section 1 of the latter Act provides in part as follows:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue

> of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands *in said reservation* in severalty to any Indian *located thereon* * * * (Italics ours.)

And Section 4 of the same Act provides in part as follows:

> That where any Indian *not* residing upon a reservation, or for whose tribe *no reservation* has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed *lands of the United States* not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, * * * in quantities and manner as provided in this act for Indians residing upon reservations; and * * * patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. (Italics ours.)

Section 5 of the same Act provides in part as follows:

> That upon the approval of the allotments provided for in this act by the Secretary of

> the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

It will be observed that Congress has in the above provisions indiscriminately used the words "allotment" and "allottee" to designate two classes of lands and two classes of Indians to whom such lands may be *allotted*. In the one case (Section 1) it refers to allotments and allottees of tribal lands in which the individual Indian may have an interest as a member of the tribe to which he belongs; and in the other (Section 4) it refers to allotments and allottees upon public lands of the United States in which the Indian, as such, has no interest whatsoever. Other provisions of the Act of 1887 are to the same effect. See also the Act of February 28, 1891, c. 383, 26 Stat. 794, amending and further extending the benefit of the General Allotment Act; the Act of May 8, 1906, c. 2348, 34 Stat. 182, amending Sec-

tion 6 of said Allotment Act; and the Act of June 25, 1910, c. 431, 36 Stat. 855, 863, where (by Section 31) the Secretary of the Interior is authorized, in his discretion, "to make allotments within the national forests in conformity with the general allotment laws as amended by section — of this act, to any Indian occupying, living on, or having improvements on land included within any such national forests who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof." It is significant, as indicating how Congress understood and applied those words in legislating for the Indians, that the patents issued under the Act of 1887 are to have the same legal force and effect as the patents issued under the Indian Homestead Act of 1884.

The General Allotment Act, as well as the other Allotment Acts cited above, so far as they affect public lands, and the preceding provisions of the Act of 1884 regarding Indian homesteads are so clearly connected that they should be deemed *in pari materia,* the purpose of all of said Acts evidently being to carry forward the policy of the former enactments to give Indians the right to secure homes upon the public domain.

Congress, therefore, must be understood as having intended that the word "allottee" as used in the Act of 1906 should be read and construed as apply-

ing not only to Indians whose allotments were originally part of tribal property in which they had an interest as members of the tribe to which both they and the lands belonged, but also to Indians, wards of the United States, who had been allotted lands on the public domain in which they originally had no interest as Indians.

That Congress has recognized that Indian *allotments* are of the same nature as Indian *homesteads* is clearly evident from various Acts relating to matters more or less connected with the subject. Thus where a fund had been provided for assisting Indian homesteaders, which was carried upon the books of the Treasury Department under the title "Homesteads for Indians," the Secretary of the Interior was authorized and directed by the Act of March 3, 1891, c. 543, 26 Stat. 989, 1007, to apply the balance of this fund for the employment of allotting agents "to assist Indians desiring to take *homesteads* under section four" of the Act of February 8, 1887, thus referring to so-called allotments as *homesteads,* under an *allotment* statute. (Italics ours.)

As was observed in the case of *Jim Crow,* 32 L. D. 657, 659:

> The objects of the laws relating to Indian *homesteads* are the same as those relating to Indian *allotments* on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the government are the same.

> Both the legislative and the executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the government. (Italics ours.)

See to the same effect the case of *Toss Weaxta*, 47 L. D. 574, 579.

The confusion in the interpretation of the Act of 1906 arises, we believe, from the fact that an Indian may acquire homestead rights either as a citizen under the general allotment laws (see the case of *Frank Bergeron, supra*), or as an Indian ward of the Government under the Act of 1884. (See *United States* v. *Hemmer, supra.*) Thus the fact that the Act of 1906 may properly be held not to apply to Indians acquiring homestead rights *as citizens* under the general homestead laws seems to have led the District Court to hold erroneously that the Act does not apply to Indians acquiring homestead rights *as Indians*—wards of the United States—under the Act of 1884. Thus, we submit, it ignored the obvious distinction between the two classes of Indian homesteaders. In the case at bar, the homestead involved undoubtedly comes under the second classification just noted.

We therefore submit that a homestead acquired by an Indian under the Act of 1884 should be regarded as an allotment, since the right conferred upon him to avail himself of the provisions of homestead laws is no doubt founded, primarily, upon the fact that he is an Indian ward of the Government,

and as such, entitled to be cared for and protected by the Government. This furnishes the reason for the exemption from the payment of fees, the form of his patent and resulting restrictions upon the alienation of his homestead so strikingly resembling an Indian allotment upon the public domain under the General Allotment Act.

The case of *Seaples* v. *Card,* 246 Fed. 501, cited by the District Court in support of its decision, is not in point, as the question involved in that case was as to the authority of the Secretary of the Interior, under the Act of May 8, 1906, 34 Stat. 182, 183, amendatory of the Act of 1887, *supra,* to cancel a patent issued to an Indian under the Acts of 1875 and 1884, *supra.* That case did not involve a construction of the Act of June 21, 1906, regarding the interpretation of which the present controversy arose.

The Interior Department has treated such Indian *homesteaders* as being upon practically the same footing as Indian *allottees,* and as coming within the purview of the statutory provisions here involved. *Toss Weaxta, supra; Jim Crow, supra; Doc Jim,* 32 L. D. 291 [illegible]. This settled construction by the Department should not be overturned by the Court except for cogent reasons, and unless it is clearly wrong (*United States* v. *Hemmer, supra; United States* v. *Healey, supra; Hewitt* v. *Schultz,* 180 U. S. 139; *United States* v. *Finnell,* 185 U. S. 236; *United States* v. *Johnston,* 124 U. S. 236, 253), or unless a different

construction is plainly required. *Hawley* v. *Diller*, 178 U. S. 476, 478.

This Court, in speaking of a long-continued practice of the Interior Department and the silence of Congress, said in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 481:

> Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

CONCLUSION

In view of the foregoing considerations, it is submitted that the questions certified by the Circuit Court of Appeals should both be answered in the affirmative.

Respectfully submitted.

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